



In the Matter of:

SWETMAN SECURITY SERVICE, INC.

ARB Case No. 98-105

***In re:* WD 94-2289 (Rev-5)
Contract No. DACW 38-97-C-0016
Warren County, Mississippi**

DATE: July 23, 1998

ORDER

On March 6, 1998, the Administrative Review Board received from Swetman Security Service, Inc. (Swetman), a request for review (Petition) of a letter from the Wage and Hour Division in a conformance action. On March 26, 1998, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule (Order). The Order required the Administrator, Wage and Hour Division, to file the administrative record of the case and a brief on or before April 27, 1998, and Swetman to file a reply brief on or before May 28, 1998. On April 27, the Acting Administrator filed a Motion to Dismiss Petition for Review, asserting that "there has been no final agency action concerning the issue raised in the Petition for Review and, thus, it is not ripe for review by the Board." On May 28, 1998, the Acting Administrator filed a Motion to File Out of Time a Request to Suspend the Briefing Order. On June 1, 1998, Swetman filed a response to the Acting Administrator's Motion to Dismiss. We issue this order to respond to the two motions filed by the Acting Administrator, and to clarify Board requirements.

BACKGROUND

The facts regarding this matter, insofar as they are discernable based upon the scanty information provided to us, are as follows. Swetman is the contractor with the U.S. Army Corps of Engineers (Corps or ACOE) on Contract No. DACW 38-97-C-0016, a federal service contract, which commenced on March 16, 1997. In November 1997 the Corps requested that the Wage and Hour Division approve additional job titles and wage rates for use on the procurement, using the Division's conformance process. *See* 29 C.F.R. §4.6(b). On December 22, 1997, Nila J. Stovall, Chief of the Branch of Service Contracts Wage Determinations, responded to that request. Petition, Exhibit (Ex.) A. One requested classification was denied.^{1/} With regard to other matters, the December 22 letter stated:

The following requested classifications with wage rates have been approved and [are] shown below:

^{1/} That classification, Administrative Law Enforcement/Security Specialist, does not appear to be at issue here.

- Project Manager/Industrial/Personnel Security and Law Enforcement Reporting Specialist \$21.62
- Physical Security Specialist/Investigator/Liaison Officer \$21.62
- Investigators \$21.62

Id. at 1.

It appears that sometime after the Wage and Hour Division’s December 22, 1997 letter, Swetman sent revised SF 1444s to the Corps.^{2/} Swetman characterizes its filing with ACOE as “our notice about the error.” *See* Petition. On January 12, 1998, June Hebler, Contracting Officer with the ACOE Vicksburg District, replied to Swetman, referencing Swetman’s revised SF 1444s:

I am returning your revised SF 1444’s. The Department of Labor has advised me, through our Contractor Industrial Relations Specialist, that the SF 1444 is not the correct action to be taken at this time. The proper course of action is described at 29 CFR 4.56. I have enclosed a copy for your use.

In accordance with 29 CFR 4.56, a Request for Reconsideration should be submitted to [the Wage and Hour Administrator].

Petition, Ex. B.

On January 26, 1998, Swetman apparently submitted a letter to the Wage and Hour Administrator requesting review and reconsideration of wage rates for the wage determination. As Swetman did not include a copy of this correspondence with its Petition we do not know precisely to whom the correspondence was addressed or what it said. Swetman states that the company requested reconsideration and “pointed out the disparity and the resulting hardship the classification would cause to contracting employees.” *See* Petition. On February 10, 1998, Nila Stovall replied to Swetman’s letter:

Our initial approval of the classifications and wage rates was done in accordance with Regulations 29 CFR, Part 4.6(b)(2). The Standard Form 1444 submitted by the contracting agency with respect to these classifications reflected agreement between the contractor, Swetman Security Service, Inc. the employees performing the work, and the input of the contracting agency, the U.S. Army Corps of Engineers. Based on our review of the submission of all interested parties in conforming the requested classifications, we determined that the corresponding wage rates appear to be reasonable. Therefore, the conformed wage rate of \$21.62 for Project

^{2/} Swetman did not attach a copy of these documents to its Petition.

Manager/Industrial/Personnel Security and Law Enforcement Reporting Specialist, Physical Security Specialist/Liaison Officer and Investigators is hereby reaffirmed.

Since all interested parties agreed, we feel this matter should be resolved with the contracting agency. I hope this is responsive to your concerns.

Petition, Ex. C.

Thereafter Swetman filed its Petition with the Board. Swetman argues that the wage conformance is erroneous because it awards the same rate to different job classifications which have significantly different duties. *See* Petition.

DISCUSSION

A. The Acting Administrator's Motion to Dismiss

The Acting Administrator argues that Swetman's Request should be dismissed because there has been no final action by the Acting Administrator:

[I]n the case at bar, there has been no final agency action concerning the conformed rate for Physical Security Specialist/Liaison Officer and Investigator under WD 94-2289 (Rev-5). The determination appealed in this case does not indicate that it is a final decision which was appealable. In addition, this determination was issued by the Chief of the Branch of Service Contract Wage Determination, who lacks the authority to issue final determinations.

Acting Administrator's Motion to Dismiss Petition for Review (Motion to Dismiss) at 3. We note that the Acting Administrator has not supported with an affidavit his assertion that the Chief of the Branch of Service Contract Wage Determination lacks the authority to issue a final, appealable determination. Furthermore, nothing in the February 17 letter itself notified Swetman that the letter was not the final determination of the Wage and Hour Administrator, or informed Swetman how it could obtain such a final determination. As we noted recently, "[i]f the Acting Administrator intends to create multiple levels of review within the Wage and Hour Division prior to issuing a 'final' decision, it would be prudent to acknowledge such levels of review clearly so that the parties and this Board will be able to distinguish a preliminary decision from a final decision." *In the Matter of Diversified Collection Services, Inc.*, ARB Case No. 98-062, Order, May 8, 1998. In light of the Acting Administrator's averment, however, we will dismiss this matter without prejudice and remand it to the Wage and Hour Division for consideration and issuance of a final and appealable ruling within 30 days of today's date.

B. The Acting Administrator's Motion to Suspend Briefing

On May 28, 1998, the Acting Administrator filed a Motion to File Out of Time a Request to Suspend the Briefing Order (Motion to Suspend). The Acting Administrator stated that in *Diversified Collection Services, Inc.*, the Board noted "with disfavor" that the Acting Administrator

had failed to submit a brief and the administrative record in accordance with the timetable set forth in the Board's scheduling order. In the Motion to Suspend filed in the instant matter, counsel for the Acting Administrator expressed great concern with the Board's ruling in *Diversified*, arguing that the Board was departing from years of past practice in which the filing by the Administrator of a motion to dismiss was treated as tolling any order concerning the submission of a brief and the administrative record. Motion to Suspend at 1-2. Counsel fears that the Board's ruling, if followed in future cases, will require the unnecessary expenditure of resources and may prejudice the Administrator.

No such deleterious outcome is likely in our view. All that *Diversified* requires is that the Administrator request that the Briefing Schedule be suspended pending resolution of his motion to dismiss. Such a request will notify all interested parties that proceedings before the Board may be interrupted pending the Board's action on the motion to dismiss. In this regard, we simply require the Acting Administrator to adhere to the same procedural standards as other parties.

For the foregoing reasons this matter is dismissed without prejudice. In accordance with its Motion to Dismiss, the Wage and Hour Administrator shall treat Swetman's Request as a request for reconsideration and issue a final ruling within 30 days of today's date. The Acting Administrator's motion to suspend the briefing schedule is granted.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member